86 - 1417

No. .....

In The
Supreme Court of the United States
October Term, 1986

—o—

SHARON COLLINS, *et al.*,
Petitioners,

v.

THE COUNTY OF KENDALL, ILLINOIS, *et al.*,
Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

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QUESTION PRESENTED

Whether petitioners' civil rights complaint stated a cause of action for bad faith prosecution by the respondents, thereby creating an exception to the *Younger* abstention doctrine.

PARTIES TO PROCEEDING

The petitioners are Sharon Collins, Frank Patroff, and Sequoia Books, Inc., an Illinois corporation, d/b/a Denmark II.

The respondents are the County of Kendall, Illinois, a body corporate and politic, Dallas Ingemunson, individually and in his capacity as State's Attorney of the County of Kendall, Illinois, Charles McDonald, individually and in his capacity as Sheriff of the County of Kendall, Illinois, and Timothy McCann, individually and in his capacity as Deputy Sheriff of the County of Kendall, Illinois.

TABLE OF CONTENTS

	Pages
Question Presented	i
Parties to Proceeding	ii
Table of Contents	iii
Opinion Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	18
Appendix	
Exhibit A—Opinion of Seventh Circuit Court of Appeals	App. 1
Exhibit B—Constitutional Provisions	App. 16
Exhibit C—Opinion of United States District Court for the Northern District of Illinois	App. 17

TABLE OF AUTHORITIES

Pages

Cases

Aetna Casualty Co. v. Flowers, 330 U.S. 464 (1947) 2

Black Jack Distributors Inc. v. Beame, 433 F.Supp. 1297 (S.D.N.Y., 1977) 12

Boyle v. Landry, 401 U.S. 77 (1971) 8

Byrne v. Karalexis, 401 U.S. 216 (1971) 8

Carr v. Zaja, 283 U.S. 52 (1931) 2

Conley v. Gibson, 355 U.S. 41 (1957) 15

De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978) 16

Dombrowski v. Pfister, 380 U.S. 479 (1965) 9, 10, 14

Doran v. Salem Inn Inc., 422 U.S. 922 (1975) 17

Dyson v. Stein, 401 U.S. 200 (1971) 8

Fitzgerald v. Peek, 636 F.2d 943 (5th Cir. 1981) 12

Grandco Corporation v. Rochford, 536 F.2d 197 (7th Cir. 1976) 12

Illinois Migrant Council v. Campbell Soup Company, 519 F.2d 391 (7th Cir. 1975) 16

Krahm v. Graham, 461 F.2d 703 (9th Cir. 1972) 10, 11, 13, 14

Kugler v. Helfant, 421 U.S. 126 (1975) 10

Moore v. Sims, 442 U.S. 415 (1979) 10

Perez v. Ledesma, 401 U.S. 82 (1971) 8

Samuels v. Mackell, 401 U.S. 66 (1971) 8

Scheur v. Rhodes, 416 U.S. 232 (1974) 16

Sequoia Books, Inc. v. McDonald, 725 F.2d 1091 (7th Cir. 1984), *cert. denied*. — U.S. —, 105 S.Ct. 83 (1984) 5, 6, 7, 13

Sequoia Books, Inc. v. Ingemunson, No. 83C3280 (N.D.Ill., 1983) 5, 13

TABLE OF AUTHORITIES—Continued

Pages

Shaw v. Garrison, 467 F.2d 113 (5th Cir. 1972) 11

Sheridan v. Garrison, 415 F.2d 699 (5th Cir. 1969) 11, 12, 14

Wilson v. Thompson, 593 F.2d 1375 (1979) 11

Younger v. Harris, 401 U.S. 37 (1971) 6, 8, 9, 10, 11, 15, 17, 18

STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... 2, 3, 4, 8, 10, 17

Federal Rule of Civil Procedure 12(b)(6) 6, 8, 15, 16, 17

Illinois Obscenity Statute, Ch. 38, § 11-20, Ill.Rev. Stat. 3, 4

United States Constitution, First Amendment 2, 3, 8, 13, 14, 17

United States Constitution, Fourth Amendment 2, 3, 8, 13

United States Constitution, Fourteenth Amendment 2, 3, 8, 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on December 3, 1986.

—o—

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 807 F.2d 95 (7th Cir. 1986). A copy of the opinion is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1254(1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. Petitioners in the district court and in the Court of Appeals asserted federal claims based on the First, Fourth and Fourteenth Amendments to the Constitution of the United States, as well as claims based on the guarantees of 42 U.S.C. § 1983. A written opinion was issued by that court on December 3, 1986. Petitioners did not seek rehearing in the Court of Appeals.

The record in this cause was lodged with the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, with the return of the mandate to that court on February 11, 1987. The United States Supreme Court has jurisdiction to review the decision of the United States Court of Appeals, however, regardless of the status of the mandate. *Carr v. Zaja,* 283 U.S. 52, 53 (1931); *Aetna Casualty Co. v. Flowers,* 330 U.S. 464, 468 (1947).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States are set forth in the Appendix as Exhibit B.

STATEMENT OF THE CASE

Petitioners, two employees and the corporate owner and operator of the Denmark Bookstore, an adult bookstore located in rural Kendall County, Illinois, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 against the County of Kendall, Illinois, and various law enforcement officials of the county. Petitioners sought an injunction to restrain the respondents from proceeding with pending criminal and civil cases directed against the bookstore operation. Their claim was based on allegations of bad faith prosecutorial and law enforcement activity intended and designed to close the bookstore, in violation of the petitioners' First Amendment rights.

The Denmark Bookstore sold and exhibited sexually explicit material, including books, magazines, videotapes and motion picture films. From March of 1980 to October of 1981, the store was operated by an individual named Carlock. During that time period, Carlock and employees of the store were the subject of criminal prosecutions, a civil nuisance action, and large scale search and seizures to the store. In these proceedings, Kendall County authorities asserted the commission of the offense of obscenity, in violation of Ch. 38, § 11-20, Ill.Rev.Stat. The pending

charges and cases were never brought to trial, and in October of 1981, when Carlock agreed to close to bookstore, all pending cases, some 15 criminal and one civil, were dismissed by the state's attorney. At the time of the dismissals, State's Attorney Ingemunson, a respondent in the instant case, publicly proclaimed success of his prosecutorial campaign, with further prosecution therefore unnecessary.

In June of 1982, petitioner Sequoia Books, Inc., acquired the Denmark Bookstore and began operation of the store, with continued sale and exhibition of sexually explicit material. Commencing in November of 1982, and continuing until early October of 1984, the respondent Kendall County law enforcement authorities instituted approximately 34 criminal cases and one civil nuisance case against the corporation, its agents, and employees, for alleged violations of obscenity under Ch. 38, § 11-20, Ill.Rev.Stat. On four separate occasions there were large-scale search and seizure operations, in which in excess of 1,100 communicative items were taken, pursuant to search warrants, from the bookstore premises.

In November of 1984, petitioners filed a civil rights suit pursuant to 42 U.S.C. § 1983. Their voluminous, detailed complaint, consisting of 21 pages with approximately 75 pages of exhibits, specified the prosecutorial and case history of these actions against the bookstore by the respondents. The complaint set forth the status of the pending state court proceedings, which included charges against petitioners Patroff and Sequoia, but not against petitioner Collins. At the time of the filing of the action, less than 10 of the 1,100 items had faced trial to determine the obscenity *vel non* of the materials. The three cases brought to trial, in May and August of 1984, had resulted in acquittals.

Petitioners' complaint asserted that the respondents' actions and policies were intended, in bad faith, to close the bookstore and prevent petitioners' exercise of their First Amendment rights. As such, petitioners alleged these exceptional circumstances justified federal court intervention in the pending state proceedings. The complaint also challenged the search and seizure procedure utilized by respondents, claiming it was unconstitutional and invalid. Prior federal civil rights complaints brought by petitioner Sequoia were detailed, namely *Sequoia Books Inc. v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), cert. denied — U.S. —, 105 S.Ct. 83 (1984), where the search and seizure procedure utilized by respondents was held valid, and *Sequoia Books Inc. v. Ingemunson*, No. 83C3280 (N.D.Ill. 1983), where the same procedure was ruled invalid.

Petitioners sought injunctive relief against pending state court proceedings and future similar prosecutorial and investigative activity directed toward the Denmark Bookstore.

Subsequent to the filing of the complaint, at the hearing before the district court on December 17, 1984, on the request for a preliminary injunction, further representation was made to the court on the status of pending cases. Respondent Ingemunson told the court that a criminal trial was set for January, 1985. At that hearing, the respondents made an oral motion to dismiss, which was granted with the court holding that the search and seizure procedures had been attacked in state court and further holding that the requirements necessary for preliminary injunctive relief could not be met. The petitioners' request to present evidence in further support of its allegations concerning bad faith was denied by the trial court.

A motion to reconsider was filed by petitioners. Respondents filed a written motion to dismiss, which contended that the court should abstain because of the pending state proceedings. Respondents further asserted that *Sequoia Books Inc. v. McDonald* was controlling authority on the search and seizure issue and thus, the complaint failed to state a claim for the granting of relief. Petitioners responded that they had pleaded bad faith on the part of respondents, constituting an exception to the *Younger* abstention doctrine, and further asserted that United States Supreme Court cases were the controlling authority on the search and seizure issues. A further status report was presented to the court through correspondence from the parties' counsel. One case had been tried against the corporation, resulting in a conviction as to three magazines.

In a written order entered May 6, 1985, the district court granted the motion to dismiss under F.R.Civ.P. 12(b)(6). In a written opinion entered May 28, 1985, the court reasoned that the quality and quantity of prosecution, and the conduct of the law enforcement officials were not sufficient to satisfy the bad faith exception to the *Younger* abstention doctrine. A copy of the court's May 28, 1985 opinion is included in the Appendix as Exhibit C.

On December 3, 1986, the Seventh Circuit issued an opinion affirming the district court's granting of the motion to dismiss. The court recognized that bad faith or harassing prosecution is an exception to the *Younger* doctrine, and that specific facts must be alleged by a plaintiff to support an inference of bad faith. The court further noted that in reviewing a Rule 12(b)(6) dismissal, the allegations of the complaint must be taken as true, and must be viewed in the light most favorable to the plaintiff. The court concluded, however, that sufficient facts supporting

an inference of bad faith prosecution or harassment had not been set forth.

In finding no bad faith exception existed, the court noted that instituting approximately 30 criminal prosecutions over a two-year period did not constitute bad faith or harassment, and found there was no undue delay in the processing of the cases in state court. This was not an instance where prosecution attempts had been unsuccessful. The court further stated that the searches were conducted through warrants in a method approved by the Seventh Circuit in *Sequoia Books Inc. v. McDonald*. As to plaintiff Collins, against whom no state case was pending, the court held that she, like the other plaintiffs, were related to the same business entity and shared the same interest in contesting the state litigation. Thus, Collins was in the same "hopper" as the other plaintiffs, and could not single herself out because of the close relationship.

Interestingly, the Seventh Circuit reflected some concern about the plaintiffs' suit. In the final paragraph of its opinion, the court declared:

> We are not holding, however, that this continuing and developing situation may not later justify further litigation by plaintiffs seeking to have similar claims reconsidered under substantially changed circumstances.
>
> 807 F.2d at 102.

Still, the court left petitioner with no opportunity to obtain relief in this suit.

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REASONS FOR GRANTING THE WRIT

PETITIONERS' COMPLAINT PURSUANT TO 42 U.S.C. § 1983 CONTAINED SUFFICIENT FACTS ESTABLISHING BAD FAITH PROSECUTION, AND THE RULE 12(B)(6) DISMISSAL WAS THEREFORE ERRONEOUS.

This case presents a significant constitutional issue for this Court to address, where a complaint brought under the Civil Rights Act contained graphic detail of bad faith prosecution by law enforcement officials, in violation of the petitioners' First, Fourth and Fourteenth Amendment rights. Petitioner's suit, predicated on the remedy envisioned by 42 U.S.C. § 1983, asserted such rights. Based on the principles of *Younger v. Harris,* 401 U.S. 37 (1971), the federal court of appeals affirmed the dismissal of petitioners' complaint under F.R.Civ.P 12(b)(6), and ignored longstanding principles of this Court that allow federal court intervention in pending state court criminal proceedings where the "bad faith" exception has been met.

It is a well-established principle and national policy, based on federalism and comity, that federal courts are reluctant to interfere with pending state court proceedings. One of the basic reasons for this public policy is, of course, that courts of equity should not restrain a criminal prosecution when the complaining party has an adequate remedy in the state court proceeding and will not suffer irreparable injury if denied equitable relief. Such are the teaching of *Younger v. Harris,* 401 U.S. 37 (1971), and the companion cases comprising the *Younger Sextet.*[1] The Court in

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[1] *Samuels v. Mackell,* 401 U.S. 66 (1971); *Boyle v. Landry,* 401 U.S. 77 (1971); *Perez v. Ledesma,* 401 U.S. 82 (1971); *Dyson v. Stein,* 401 U.S. 200 (1971); and *Byrne v. Karalexis,* 401 U.S. 216 (1971).

Younger, however, recognized that exceptions can exist in limited circumstances which would justify intervention. As Justice Stewart stated in his concurring opinion:

> Such circumstances exist only when there is a threat of irreparable injury 'both great and immediate'. A threat of this nature might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face . . . *or if there has been bad faith and harassment—official lawlessness—in a statute's enforcement.* In such circumstances the reasons of policy for deferring to state adjudication are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective actions to protect federal rights.
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> 401 U.S. at 56 (citations omitted, emphasis added).

Authority for federal injunctive relief against enforcement of state criminal statutes, where arrests and threatened prosecutions were alleged to have been in bad faith and for purposes of harassment, had been given prior recognition by this Court in *Dombrowski v. Pfister,* 380 U.S. 479 (1965), where the Court stated:

> The allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury.
>
> 380 U.S. at 485-486.

In *Younger,* the Court reaffirmed the *Dombrowski* principles, and noted that there was no suggestion that the single prosecution against Harris was brought in bad faith, or that it was only "one of a series of repeated prosecutions to which he will be subjected." 401 U.S. at 49. Subsequent cases before this Court have reaffirmed the "bad faith" exception to federal court abstention. See, *e.g., Kugler v. Helfant,* 421 U.S. 126 (1975); *Moore v. Sims,* 442 U.S. 415 (1979).

Federal courts have found justification for a federal court's intervention in state court proceedings, in light of the *Younger* principles. In *Krahm v. Graham,* 461 F.2d 703 (9th Cir. 1972), an action under 42 U.S.C. § 1983 was brought against Phoenix city officials by owners and clerks of newstands and bookstores. The plaintiffs in *Krahm* asserted that the defendant had mounted a campaign of bad faith and harassment in state court by filing over 100 criminal charges under the Arizona Anti-Obscenity Statute, and conducting large scale seizures on 11 different occasions. Only 11 cases had been brought to trial, with no resultant convictions, and cases were being filed faster than they could be tried. Public officials sought to influence the courts by making public announcements to arouse public concern about pornography. As a result of the defendants' actions, the plaintiffs' stores were forced to close for periods of time, large amounts of store merchandise were seized by the police, and substantial expenditures of money for legal defense were required.

The district court in *Krahm* issued an injunction against the pending state court proceedings, and the Ninth Circuit affirmed. Relying upon *Dombrowski v. Pfister,*

380 U.S. 479 (1965), and addressing the *Younger* principles, the court of appeals stated:

> Surely the damage from this sort of activity is both irreparable and 'great and immediate.' It can put the plaintiffs out of business without ever convicting any of them of anything. Nor can the threat to plaintiffs' first amendment rights be eliminated by defense against the state prosecutions. Successful defense against eleven of them, plus the voluntary dismissal of two others, brought the filing of fourteen more, and later of an additional nineteen. There are about ninety still pending.

461 F.2d at 707.

Prosecutions and search and seizures brought in bad faith for the purposes of harassment, that is to hinder, restrict, or prevent the exercise of constitutionally protected rights, constitute great and irreparable injury for purposes of a federal court injunction in a pending state proceeding. Under these circumstances, the plaintiffs' federal rights cannot be vindicated through a defense in state proceedings and, thus, the principles of comity and federalism are inapplicable. *Shaw v. Garrison,* 467 F.2d 113 (5th Cir. 1972); *Wilson v. Thompson,* 593 F.2d 1375 (1979). The state court proceeding can even become an oppressive evil that can be remedied through the federal civil rights statute and its derivative federal injunctive power. As the Fifth Circuit noted in *Sheridan v. Garrison,* 415 F.2d 699 (5th Cir. 1969):

> [T]he power of the federal courts to enjoin pending state criminal proceedings that deny civil rights is an essential part of the remedy provided by § 1983, at least in those cases in which the proceeding *itself* effects the denial. For if federal jurisdiction did not exist in this instance, state officials disposed to suppress speech could easily do so by bringing oppressive

> criminal actions pursuant to valid statutes rather than by enacting invalid statutes or using other parts of the state legal machinery, and § 1983 would give no effective relief unless they happened to warn their victims in advance. In *Dombrowski* and cases of its nature, the substance of the complaint is exactly this: that state officials are using or threatening to use prosecutions, *regardless of their outcome,* as instrumentalities for the suppression of speech.
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> 415 F.2d at 706 (court's emphasis).

See also, *Fitzgerald v. Peek,* 636 F.2d 943 (5th Cir. 1981); *Grandco Corporation v. Rochford,* 536 F.2d 197 (7th Cir. 1976); *Black Jack Distributors Inc. v. Beame,* 433 F.Supp. 1297 (S.D.N.Y. 1977).

In the instant case, the petitioners' complaint painted a vivid picture of a 4½-year history of the Denmark Bookstore and the activities of Kendall County officials directed against the store. Under its first owner, a variety of arrests, searches and seizures, and prosecutions were brought, but no trials on the obscenity charges were ever held. Ultimately, the owner closed the store and all charges were subsequently dismissed by the prosecutor. Petitioners asserted this established that the final goal of the prosecuting authorities was not to obtain a determination as to the obscenity of any one item of sexually explicit material, or conviction of any one individual of the charge of obscenity. Rather, the goal was to close the store and accomplish a total ban on the availability of any sexually explicit materials in Kendall County.

The bookstore reopened under new ownership, however, and because of their prior success, the Kendall County officials repeated their efforts in identical fashion. A multiplicity of suits, criminal and civil, were brought against

employees of the store, the corporation, and officers and agents of the corporation, and massive searches and seizures were conducted. Multiple defendants were charged by complaint each time a purchase or massive search and seizure was conducted by the law enforcement officials.

As in *Krahm v. Graham,* the cases were brought faster than they could be tried, with the only interruption occurring when federal court injunctive relief on the validity of the search and seizure procedure temporarily halted that tool. Federal district judge Milton Shadur, in *Sequoia Books v. Ingemunson,* No. 83C3280 (N.D.Il., 1983), had granted the plaintiff injunctive relief based on asserted First, Fourth and Fourteenth Amendment rights. When this Court denied certiorari in *Sequoia Books Inc. v. McDonald,* 725 F.2d 1091 (7th Cir. 1984), cert. denied — U.S. —, 105 S.Ct. 83 (1984), undaunted, the respondents repeated their legal chicanery, culminating with the October, 1984 large scale search and seizure which led to the filing of this federal lawsuit by petitioners.

At the time of the filing of the suit, and even at the time of the hearing at which the oral motion to dismiss was granted, only three criminal cases had been tried and those had resulted in acquittals. Suddenly, the timeliness of the state court actions became important to the respondents. Representations were made to the district court at the hearing set on the preliminary injunction that the prosecution had scheduled cases for trial for the following month in state court. By subsequent correspondence from respondents, the district court judge was kept apprised of cases

brought to trial; however, no mention was made of the prosecutorial election to abandon their contention that hundreds of magazines seized were obscene, and that the material lay unused in an evidence locker.[2]

The plan of the Kendall County officials was clear and simple, and the exactitudes and stringent requirements of the First Amendment were of no concern in carrying out the attack on petitioners' business. The prior history and the recent history of the prosecuting authorities, all as detailed and fully supported in petitioners' complaint (documents from every state court case were appended to the complaint) unquestionably sufficiently supported petitioners' contentions that the prosecutions were "official lawlessness", brought in bad faith and for purposes of harassment. The ultimate aim, as petitioners asserted from the beginning, was the forced permanent closure of the Denmark Bookstore and total suppression of dissemination of protected material, not a determination as to the obscenity *vel non* of the items specifically charged.

The petitioners were clearly placed in a position where the threat to their First Amendment rights could not be eliminated by a defense in the state proceedings. The allegations within their complaint depicted the same type of situation recognized in *Dombrowski* where a significant and substantial loss of rights of freedom of expression would occur absent intervention by the federal court. The Fifth Circuit, in *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969), and the Ninth Circuit, in *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972), properly interpreted this holding in

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2 A motion to supplement the record regarding this latter information was presented to and granted by the Court of Appeals.

identifying situations where oppressive criminal actions were brought pursuant to valid statutes as a method for suppression of speech.

Of utmost signifiance, however, is the manner in which the trial court disposed of the petitioners' cause of action. Based first on an oral motion to dismiss, and then on a written one, the district court applied every possible negative inference he could. The prior history of the enforcement activities against the store was ignored. The complaint was interpreted as narrowly as possible and in the light most favorable to the defendants. All plaintiffs were treated the same for *Younger* purposes, despite the finding that no state proceedings were pending against Sharon Collins. In affirming the trial court ruling, the Court of Appeals recognized that all of the allegations of the complaint must be taken as true and must be viewed in the light most favorable to the plaintiffs. Petitioners assert that proper application of existing principles of law, given the factual situation in the instant case, could only result in the denial of a motion to dismiss under Rule 12(b)(6).

In *Conley v. Gibson*, 355 U.S. 41 (1957), this Court had occasion to address the adequacy of a complaint, and noted the accepted rules, stating:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

355 U.S. at 45-46.

Later, in *Scheur v. Rhodes*, 416 U.S. 232 (1974), the Court explained:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. *The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.* Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.
>
> 416 U.S. at 236. (emphasis added)

Other federal courts have noted the general disfavor of such notions and have applied the same principles. *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978); *Illinois Migrant Council v. Campbell Soup Company*, 519 F.2d 391, 394 (7th Cir. 1975).

Petitioners emphasize that even though a hearing was scheduled on their request for a preliminary injunction, no final court order was ever entered on their request. Indeed, the district court refused to allow petitioners to present any evidence in support of its request. Instead, the court chose to grant the defendants' motion to dismiss under Rule 12(b)(6), which at first was a vaguely stated oral motion. Thus, as the Court noted in *Scheur*, plaintiffs were under no burden to establish that they would ultimately prevail; rather, the issue was the limited one of whether they were entitled to offer evidence on their claim.

The petitioners' cause of action was predicated on a well-documented, supported, and sound theory of a bad faith violation of their First Amendment rights under the principles of the case law discussed herein. Considering all the allegations of the complaint as true, and giving the fullest inferences in the light most favorable to them, a bad faith scenario was demonstrated, warranting a finding that *Younger* abstention did not apply. Certainly, Sharon Collins was improperly placed in the same hopper with the other plaintiffs for *Younger* purposes in light of this Court's holding in *Doran v. Salem Inn Inc.*, 422 U.S. 922, 928-930 (1975). Even if the evidence did not support a bad faith finding, a federal injunctive remedy was available to Collins.

Petitioners submit that a Rule 12(b)(6) dismissal under the factual history of the present case was erroneous, and in contradiction of the principles of law in cases of this Court and other federal courts. This Court should recognize the conflict between the holdings of the Fifth and Ninth Circuits in cases seeking injunctive relief under the Civil Rights Act, and the decision of the Seventh Circuit in this case, in applying the bad faith exception to the *Younger* doctrine. That conflict is especially egregious here because of the lower court's dismissal based on a Rule 12(b)(6) motion. In light of this conflict the Court should address this flagrant constitutional error of the lower court holdings in this case, and should grant certiorari to remedy the violation of the petitioners' First Amendment rights.

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CONCLUSION

In its opinion below, the Seventh Circuit Court of Appeals improperly upheld the district court's grant of a motion to dismiss the petitioners' civil rights complaint. The complaint clearly established allegations of bad faith and harassment on the part of the respondents, and dismissal on *Younger* principles was erroneous. This case presents significant issues worthy of this Court's consideration. Certiorari should be granted to review and reverse the holding of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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March 1987

APPENDIX

EXHIBIT A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1947

SHARON COLLINS, FRANK PATROFF and SEQUOIA BOOKS, INC., an Illinois corporation, d/b/a DENMARK II,

Plaintiffs-Appellants,

v.

COUNTY OF KENDALL, ILLINOIS, a body corporate and politic, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 84 C 10011—Charles R. Norgle, *Judge.*

ARGUED JANUARY 16, 1986—DECIDED DECEMBER 3, 1986

Before WOOD, JR., POSNER, and FLAUM, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* Plaintiffs appeal dismissal, based on the *Younger* abstention doctrine, of their suit under 42 U.S.C. § 1983. Plaintiffs claim that the district court erred in dismissing the case because their complaint alleged bad faith prosecution which is an exception to the *Younger* doctrine. We affirm.

I. FACTS

The plaintiffs—Sequoia Books, Inc., Frank Patroff, and Sharon Collins—are the corporate owner and two employees of the Denmark II, an adult bookstore that sells and exhibits books, magazines, and films of an explicit sexual nature. Plaintiffs brought a section 1983 action alleging that the defendants—the County of Kendall, the State's Attorney, the Sheriff, and the Deputy Sheriff of Kendall County, Illinois—initiated state criminal obscenity charges, a civil nuisance suit, and searches and seizures of their bookstore in order to harass and annoy the plaintiffs with the purpose of forcing the bookstore to close. The plaintiffs claim that such bad faith prosecutions have deprived them of their constitutional rights under the first, fourth, and fourteenth amendments, and therefore seek money damages, and declaratory and injunctive relief from pending criminal charges as well as future actions. The plaintiffs moved for a preliminary injunction and requested a hearing. At the hearing, the defendants, who maintain they have not acted in bad faith but instead have exercised lawful authority in enforcing the state's obscenity laws, made an oral motion to dismiss asserting that the pending state criminal prosecutions required the district court to abstain in accordance with *Younger v. Harris*, 401 U.S. 37 (1971).

The district court denied the plaintiffs' request to present evidence and denied their motion for a preliminary injunction. The judge ruled that the plaintiffs had not fulfilled the requirements for preliminary injunctive relief. Indeed, he stated that they had not even established a

need for an evidentiary hearing on their motion.[1] The plaintiffs moved for reconsideration, and the defendants filed a written motion to dismiss. The district court denied the motion for reconsideration and granted the motion to dismiss, holding that the plaintiffs had failed to allege sufficient facts to support an inference of bad faith or harassing prosecution, an exception to the *Younger* doctrine. The district court therefore found that injunctive relief was unavailable and that abstention was required in light of the pending state prosecutions against Sequoia Books and Patroff.

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[1] Plaintiffs argue that the case should be remanded for a hearing to allow them to call the defendants as witnesses to prove their bad faith. The plaintiffs, however, never renewed their request to present evidence after the hearing turned into an oral argument about the defendants' motion to dismiss. Instead the plaintiffs argued against the dismissal motion and never requested that the defendants testify as scheduled. It was well within the judge's discretion to decide that the plaintiffs' motion could be decided upon the briefs and oral argument without an evidentiary hearing.

The plaintiffs suggest nothing factually specific that they sought to elicit from the defendants, except in a conclusory way. Plaintiffs are seeking to fish in a dry pond. The record of the state prosecutions is an adequate basis to leave state court business to state courts, at least at this time.

The plaintiffs also complain that the court allowed one of the defendants, State's Attorney Ingemunson, to "interject himself in the proceedings, not as a called witness, but an advocate for himself and the other defendants without facing the prospect of cross-examination." This characterization, however, is inaccurate. At the trial court's request, Ingemunson clarified the status of cases pending in state court against the plaintiffs. At the time, the plaintiffs did not object to this colloquy between the judge and Ingemunson. In fact, plaintiffs' counsel agreed with Ingemunson's explanation of the status of the cases. Indeed, both parties agreed to stipulate to the number of cases pending against the plaintiffs. Ingemunson also addressed the court at the end of the hearing, but there was no impropriety as the court had already ruled upon the plaintiffs' motion.

The defendant first brought misdemeaner and felony obscenity charges against the Denmark II bookstore in April 1980. At that time, the Denmark II was owned by Lawrence Carlock, and Sequoia Books had no interest in it. About two weeks later, a search of the bookstore took place, several items were seized, and felony obscenity charges were filed. Carlock closed the store in Octobr 1981. Following the closure, the criminal charges were dismissed.

Sequoia Boks bought the Denmark II in June 1982. In November and December of 1982, and again in March 1983, misdemeanor obscenity charges were filed against several bookstore employees regarding material on sale at the bookstore. In March, May, and June of 1983, and in January and October of 1984, the defendants conducted searches of the Denmark II and seized many items.[2] Following these searches, misdemeanor charges were brought against other Denmark II employees. The district court found that "34 state criminal prosecutions were initiated against the Plaintiffs. Of these, at least nine remain pending, three resulted in convictions, and in three Plaintiffs were found not guilty."

II. DISCUSSION

In *Younger*, the Supreme Court held that federal courts should refrain from enjoining state criminal prose-

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[2] In their brief, plaintiffs refer to the prosecution not bringing charges for every magazine seized and yet keeping all the magazines as evidence. At the preliminary injunction hearing, however, plaintiffs' attorney stated that the seized inventory had been "resupplied" and that the bookstore therefore was in operation.

cutions pending when the federal suit was filed, in accord with traditional principles of equity, comity, and federalism.[3] *Younger v. Harris*, 401 U.S. 37, 53 (1971). In *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607 (1975), the Court held that *Younger* also applies to state civil nuisance proceedings. Bad faith or harassing prosecution, however, is an exception to the *Younger doctrine*.[4] *Huffman*, 420 U.S. at 611. " '[A] showing of a bad faith [prosecution] is equivalent to a showing of irreparable injury for purposes of the comity restraints defined in *Younger*.' " *Wilson v. Thompson*, 593 F.2d 1375, 1382 (5th Cir. 1979) (quoting *Shaw v. Garrison*, 467 F.2d 113, 120 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972)). The harm posed by bad

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[3] As we have earlier noted:

> The *Younger* doctrine is based on, and its contours established by, two principles of equity jurisprudence. The first is that an injunction is an extraordinary remedy, rarely available as a matter of right and never more extraordinary than when, if granted, it would prevent government officials from proceeding under a statute founded on important state interests against a violator of the statute; such an injunction would offend comity and federalism. The second principle is that an injunction will not be issued when the plaintiff has an adequate remedy at law, which he does if he can assert the ground on which he seeks an injunction as a defense to the very proceeding that the injunction would put a stop to.

W. C. M. Window Co. v. Bernardi, 730 F.2d 486, 490 (7th Cir. 1984).

[4] The other two exceptions to *Younger* abstention are: (1) if the state court proceeding would not afford the plaintiff an opportunity to raise his constitutional claims; and (2) if a statute is "flagrantly and patently violative of express constitutional prohibitions." *Younger*, 401 U.S. at 49, 53. *See Sekerez v. Supreme Court of Indiana*, 685 F.2d 202, 205 (7th Cir. 1982).

faith prosecution is both immediate and great,[5] and defending against the state proceedings would not be an adequate remedy at law because it would not ensure protection of the plaintiff's federal constitutional rights. *Younger*, 401 U.S. at 46. *See Juidice v. Vail*, 430 U.S. 327, 337 (1977).

A plaintiff asserting bad faith prosecution as an exception to *Younger* abstention must allege specific facts to support an inference of bad faith. "The *Younger* rule, as applied in *Hicks* [*v. Miranda*, 422 U.S. 332 (1975)], requires more than a mere allegation and more than a 'con-

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[5] As the Fifth Circuit has stated:

> The *Younger* doctrine presumes that "the only constitutional issue at stake is the validity of the challenged state law—that *being prosecuted* under an arguably (or actually) invalid law is not itself a violation." *Developments in the Law—Section 1983 and Federalism*, 90 Harv.L.Rev. 1133, 1286 (1977) (emphasis in original). That presumption does not obtain when the *prosecution itself* effects the constitutional violation . . .
>
> > When a significant chilling effect on free speech is created by a bad faith prosecution, the prosecution will thus as a matter of law cause irreparable injury regardless of its outcome, and the federal courts cannot abstain from issuing an injunction.
>
> [*Sheridan v. Garrison*], 415 F.2d [699,] 706 [5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970)] (emphasis in original).
>
> With respect to the interests of the State, it by definition does not have any legitimate interest in pursuing a bad faith prosecution brought to retaliate for or to deter the exercise of constitutionally protected rights. Perhaps the most important comity rationale of *Younger* deference—that of respect for the State's legitimate pursuit of its substantive interests, see *Younger*, 401 U.S. at 51-52, 91 S.Ct. 746; *Trainor v. Hernandez*, 1977, 431 U.S. 434, 441, 97 S.Ct. 1911, 52 L.Ed.2d 486—is therefore inapplicable.

Wilson v. Thompson, 593 F.2d 1375, 1382-83 (5th Cir. 1979) (footnote omitted).

clusory' finding to bring a case within the harassment exception." *Grandco Corp. v. Rochford*, 536 F.2d 197, 203 (7th Cir. 1976). This specific evidence must show that state prosecution "was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights." *Wilson*, 593 F.2d at 1383.

In ruling upon the defendants' motion to dismiss here, the district court made the following findings:

> The Plaintiffs allege three activities by state officials as the basis for its [sic] allegations of bad faith: multiple prosecutions, several of which have been dismissed or have resulted in acquittal, a number of searches of the bookstore and seizures of its property, and the filing of a civil nuisance suit. As had already been stated of the 34 state criminal prosecutions brought against Plaintiffs based on obscenity charges, three have led to acquittals, three have led to convictions, a number have been dismissed, and at least nine are pending. Additionally, the Denmark II has been searched, pursuant to valid warrants, five times during an 18 month period. Many items were seized during these searches and misdemeanor obscenity charges occasionally followed the searches. A civil nuisance suit has also been filed and is pending.

Collins v. County of Kendall, No. 84 C 10011, at 5 (N.D. Ill. May 28, 1985). The district court determined that the multiple prosecutions alone did not establish bad faith, that the searches and seizures were pursuant to valid warrants and had been upheld by this court, that the defendants successfully prosecuted the plaintiffs on three ob-

scenity charges,[6] and that the civil nuisance suit did not raise the otherwise lawful law enforcement activities to the level of bad faith prosecution.

In reviewing a Rule 12(b)(6) dismissal, we take all allegations in the complaint as true. *Kugler v. Helfant,* 421 U.S. 117, 125 (1975); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.,* 756 F.2d 1262, 1264 (7th Cir. 1985); *Haroco, Inc. v. American National Bank & Trust Co.,* 747 F.2d 384, 385 (7th Cir. 1984), *aff'd,* 105 S. Ct. 3291 (1985). In addition, we view all allegations in the light most favorable to the plaintiff. *Wilson v. Harris Trust & Savings Bank,* 777 F.2d 1246, 1247 (7th Cir. (1985); *Haroco,* 747 F.2d at 385.

After reviewing the record, and based upon the principles set forth above, we agree with the district court that the plaintiffs have failed to set forth facts supporting an inference of bad faith prosecution or harassment. Instituting approximately thirty criminal prosecutions over a two-year period does not constitute bad faith or harassment in and of itself. *See Grandco Corp. v. Rochford,* 536 F.2d 197, 203 (7th Cir. 1976) (court "not per-

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[6] Plaintiffs also complain that the district court permitted the defendants to make off-the-record communications with the court by letter and then interpreted that information in the light most favorable to the defendants. Plaintiffs received copies of the correspondence and thereafter responded by letter without objection. Plaintiffs now object to "[t]he reporting of three convictions and a mistrial in cases tried during the winter and spring of 1985." The defendants apprised the court by letter of these case dispositions, a conviction and a mistrial, which occurred after the motion to dismiss was filed. The district court did not err in considering these undisputed matters appearing on the public record. The district court did not rely on the mistrial in its order.

suaded that evidence of multiple prosecutions is sufficient by itself to support [the] necessary inference" of bad faith and harassment); *Sandquist v. Pitchess*, 332 F. Supp. 171, 179 (C.D. Cal. 1971) ("Where one distributes or exhibits a great number of different publications or films, each of which is colorably obscene, he assumes a risk of multiple prosecutions and the number of arrests and prosecutions he encounters cannot be determinative of whether bad-faith harassment has occurred."). One-third of these cases were dismissed, but the Apellate Court of Illinois reversed the dismissals and remanded for further proceedings, *People v. Bailey*, 125 Ill. App. 3d 346, 465 N.E.2d 979 (1984), and the Supreme Court of the United States denied certiorari, *Bailey v. Illinois*, 471 U.S. 1057 (1985). In eight cases, six of which are against the president of Sequoia Books, service of the arrest warrant could not be obtained as the defendants apparently could not be located. Of the remaining twelve cases, three resulted in directed verdicts of not guilty, in one case the prosecutor withdrew the charges, and the prosecutor has indicated that he will do the same in another case. One case was still in the motions stage, one was set for trial, and four cases had been filed just two weeks before the plaintiffs filed their federal suit. In addition, based upon correspondence from both parties, the district court was aware when it ruled upon the dismissal motion that the defendants successfully prosecuted Sequoia Books on three counts of selling obscene magazines.

Plaintiffs acknowledge that the district judge was aware of this conviction, but characterize the conviction as evidence of bad faith also. Plaintiffs contend that the filing of their suit in federal court spurred the defendants

to push the cases through the state court system to justify the searches and the prosecutions. Plaintiffs conclude that "this conduct just as easily can be read to show that bad faith existed at the time the federal complaint was filed." We disagree with the plaintiffs' conclusion. The docket sheets do not indicate any undue delay in processing these cases through the state's criminal courts. The plaintiffs apparently were satisfied with the pace as they made no attempt to expedite the matter.

Plaintiffs cite *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and a Ninth Circuit case, *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972), as support for their argument that their complaint made out a sufficient showing of bad faith by the defendants to avoid the *Younger* abstention doctrine. The facts of both cases, however, differ significantly from those in the case before us. In *Dombrowski*, the Supreme Court found official bad faith and harassment in the state criminal prosecution of the Southern Conference Educational Fund, Inc. (SCEF), a civil rights organization. State officials threatened to prosecute the SCEF and its director for alleged violations of the state Subversive Activities and Communist Control Law and the Communist Propaganda Control Law even after a state judge had quashed arrest warrants and suppressed evidence seized in an illegal raid of organization offices. *Dombrowski*, 380 U.S. at 487-88. The SCEF and others were indicted under the Subversive Activities and Communist Control Law, and officials allegedly threatened to prosecute them under other state laws as well. *Id.* at 489. The seizure of documents and records had "paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause." *Id.* at 488-89. In

addition, state officials had repeatedly announced that the SCEF was a subversive or Communist-front organization whose members must register or be prosecuted under state statutes, which allegedly had the effect of discouraging new membership and contributors. *Id.* at 488.

In *Krahm*, the Ninth Circuit upheld the district judge's grant of an injunction against harassment of the plaintiffs through bad faith prosecutions of Arizona's anti-obscenity statute. The *Krahm* court emphasized the number of prosecutions pending when the federal suit was filed—over 100, with each plaintiff facing between 10 and 20 charges. None of the cases in *Krahm* resulted in convictions. The prosecutions were part of an "anti-pornography campaign . . . spearheaded by the mayor, [one of the three defendants in the federal suit,] with announcements on television and to the newspapers." *Id.* at 705. As part of this "campaign," the mayor had anti-obscenity petitions circulated to 50,000 people in Phoenix, Arizona. The mayor indicated publicly that the petitions were meant to influence the community so that jurors would more likely convict at trial and to make clear to the city magistrates, who could be fired at will by the mayor and city council, how the community felt on this issue. The mayor also told the newspapers that the plaintiffs were involved with the Mafia, and made several other statements for which he had no basis. In conjunction with these public announcements, the police conducted about a dozen illegal searches and seizures; and the police continued such seizures despite a state court order declaring the method of seizure illegal, until the federal district court issued an injunction.

In this case, there was no concerted publicity campaign aimed at putting the plaintiffs out of business for

exercising their first amendment rights. Plaintiffs point to the filing of criminal charges against the previous owner which were dismissed after the owner closed the bookstore. However, the dismissal of the charges does not indicate a pattern of bad faith prosecution, but rather a realistic allocation of resources. The closing of the bookstore ensured that the offensive materials would not be sold and therefore continued prosecution would not serve any purpose. This does not represent a violation of the plaintiffs' constitutional rights, as the prosecutor necessarily must have the discretion to make such decisions in view of the limited resources available to him. Furthermore, all the searches in this case were conducted pursuant to judicially approved search warrants, and the search methods were subsequently approved by this court in *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091 (7th Cir.), *cert. denied*, 469 U.S. 817 (1984). *See Hicks v. Miranda*, 422 U.S. 332, 351 (1975) (search and seizure based on valid judicial warrant cannot lead to finding of bad faith and harassment).

We do not mean to insinuate that plaintiffs must allege the type of extreme factual situation present in *Krahm* to show bad faith and harassment. *Krahm* is distinguishable not only on the basis of its unusual facts, but also because, as we noted in *Grandco Corp. v. Rochford*, 536 F.2d 197, 204 (7th Cir. 1976), the multiple prosecutions in *Krahm* were consistently unsuccessful. *Id.* at 204. The multiple prosecutions in *Dombrowski* were also characterized by failure. As we stated in *Grandco*, "state attempts [in *Domsrowski*] to prosecute the federal plaintiffs had been uniformly *unsuccessful*. Yet state officials threatened to initiate new prosecutions and to conduct fur-

ther searches and arrests even though earlier arrest and search wararnts had been summarily vacated." *Id.* at 203 (emphasis in original).

In the instant case, defendants have successfully prosecuted the plaintiffs on three obscenity charges. A case had been set for trial and one case was still in the motions stage when the district court ruled on the motion for dismissal. The facts alleged by the plaintiffs in their complaint do not indicate that the "state officials are using or threatening to use prosecutions, *regardless of their outcome*, as instrumentalities for the suppression of speech." *Sheridan v. Garrison*, 415 F.2d 699, 706 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970) (emphasis in original). Nor do the plaintiffs' allegations amount to a showing that "the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights." *Cameron v. Johnson*, 390 U.S. 611, 621 (1968). The district court therefore did not err in dismissing the case as the plaintiffs' complaint did not allege facts amounting to bad faith prosecution.

Plaintiff Sharon Collins argues that she should have been considered separately from the other two plaintiffs because there were no cases pending in state court against her. Collins argues that the *Younger* principles do not apply in her case and that therefore injunctive relief should be available. The plaintiff relies upon *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975), in which the Supreme Court treated each respondent separately, stating: "We do not agree with the Court of Appeals . . . that all three plaintiffs should automatically be thrown into the same hopper for *Younger* purposes." The Court

also stated that "[t]here plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them." *Id.* at 928.

Although the *Doran* Court concluded that it was not faced with such a case, considering the lack of common ownership, control, and management of the three businesses, the relationship between the plaintiffs here is sufficient to warrant similar treatment under *Younger*. We are not faced with three separate and distinct businesses whose only connections were having the same attorney and conducting similar business activities. We have instead three plaintiffs who are all related to the same business entity, the Denmark II bookstore. Sharon Collins and Frank Patroff are both employees of the bookstore which is owned by the third plaintiff, Sequoia Books. All three plaintiffs thus share the same interest in contesting in the state litigation the classification of the magazine as obscene, and Patroff and Sequoia Books could adequately represent that interest in the state proceeding. *See W. C. M. Window Co. v. Bernardi,* 730 F.2d 486, 492 (7th Cir. 1984). Consequently, the district court did not err in not considering Collins separately, and the abstention discussion above applies with equal force to her.

Furthermore, Collins put herself in the same "hopper" as the other two plaintiffs in the bad faith prosecution argument. Collins, whose criminal charges ended in a jury verdict of not guilty, does not single herself out in the complaint and argue that the defendants established a pattern of bad faith prosecutions and harassment against her alone. Collins in essence asserts that the federal court

should consider the facts as a whole when assessing the bad faith claim, but yet ignore the close relationship between the plaintiffs when applying the *Younger* doctrine. These two analyses are intertwined, however, just as the interests of Collins in this case are inseparable from those of Patroff and Sequoia Books.

III. CONCLUSION

The district court did not err in concluding that the facts alleged in the plaintiffs' complaint do not constitute bad faith prosecution or harassment. As no exception to the *Younger* doctrine applies in this case, the district court properly abstained from enjoining the pending state proceedings. Furthermore, the district court properly considered all three defendants together because their interests are so closely related. We are not holding, however, that this continuing and developing situation may not later justify further litigation by plaintiffs seeking to have similar claims reconsidered under substantially changed circumstances. Therefore, the district court's decision is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

EXHIBIT B

FIRST AMENDMENT
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHARON COLLINS, FRANK PATROFF, and SEQUOIA BOOKS, INC., an Illinois corporation, d/b/a Denmark II,

Plaintiff, No. 84 C 10011

vs.

COUNTY OF KENDALL, ILLINOIS, a body corporate and politic, DALLAS INGEMUNSON, individually and in his capacity as State's Attorney of the County of Kendall, Illinois, CHARLES McDONALD, individually and in his capacity as Sheriff of the County of Kendall, Illinois, TIMOTHY McCANN, individually and in his capacity as Deputy Sheriff of the County of Kendall, Illinois, Judge Charles R. Norgle

Defendants.

ORDER

This matter is before this Court on Defendants' motion to dismisss pursuant to Fed. R. Civ. P. 12(b)(6) and 12(h)(3). The Plaintiffs seek to enjoin pending state criminal proceedings brought against them by Defendants. The Defendants assert that this Court should abstain from issuing an injunction pursuant to the *Younger* abstension doctrine. *See Younger v. Harris,* 401 U.S. 37 (1971). For the reasons stated below, the Defendants' motion to dismiss is granted.

The Plaintiffs are the corporate operator and two employees of the Denmark II, an adult bookstore that sells and exhibits books, magazines, and films of an explicit sexual nature. They allege that the Defendants, the County of Kendall, the State's Attorney, Sheriff, and Deputy Sheriff of Kendall County, Illinois have initiated state criminal obscenity charges, a civil nuisance action, and searches and seizures of their bookstore in order to harass and annoy Plaintiffs with the purpose of forcing the bookstore to close. Plaintiffs claim that such bad faith prosecutions have deprived them of their constitutionally protected rights under the first, fourth and fourteenth amendments to the United States Constitution in violation of 42 U.S.C. § 1983, and seek to have the pending criminal charges as well as future actions enjoined. The Defendants, who maintain that they have not acted in bad faith but instead have exercised lawful authority in enforcing the state's obscenity laws, *see* Ill. Rev. Stat. ch. 38, §§ 11-20 (1983), have requested this Court to refrain from enjoining the pending criminal prosecutions in accordance with the *Younger* abstension doctrine.

The Defendants first brought misdemeanor and felony obscenity charges against the Denmark II Bookstore in April, 1980. At that time, the Denmark was owned by persons other than the Plaintiffs. About two weeks later, a search of the bookstore took place, several items were seized, and felony obscenity charges were filed. The owners closed down the store in October of 1981. Following the closure, the criminal charges were dismissed.

The Denmark II was purchased by Plaintiffs in June, 1982. In November and December of 1982, and again in

March, 1983, misdemeanor obscenity charges were filed against Plaintiffs regarding material on sale at the bookstore. In March, May, and June of 1983, and in January and October of 1984, the Defendants conducted searches of the Denmark II and seized many items. Following these searches, misdemeanor charges were brought against Plaintiffs. All in all, 34 state criminal prosecutions were initiated against the Plaintiffs. Of these, at least nine remain pending, three resulted in convictions, and in three Plaintiffs were found not guilty. Plaintiffs allege that this "pattern of law enforcement activity" was designed by the Defendants to restrain, harass, and prohibit the Plaintiffs from exercising the civil rights granted to them by the first, fourth, and fourteenth amendments.

The sole issue presented is whether this Court may enjoin these pending state criminal proceedings. Both parties agree that the rule in *Younger v. Harris*, 401 U.S. 37 (1971), applies to this case. *Younger* requires a federal district court to refrain from interfering with pending state criminal proceedings in deference to principles of equity, comity, and federalism. *Younger*, 401 U.S. at 53; *Dombrowski v. Pfister*, 380 U.S. 479 (1965). A recognized exception to this rule arises in cases involving official bad faith or harassment in enforcing state laws, or in other extraordinary circumstances. *Younger*, 401 U.S. at 4; *Grandco Corp. v. Rochford*, 536 F.2d 197, 202 (7th Cir. 1976). Underlying both the rule and its exception is the assumption that a plaintiff's federal constitutional claims can fairly be vindicated in state court proceedings without federal intrusion, *Grandco*, 536 F.2d at 202, and that in such a case principles of comity and federalism require the federal district court to abstain.

In meeting the bad faith exception to the *Younger* abstention doctrine, the plaintiff must allege specific facts, supported by evidence, from which bad faith on the part of the defendant can be inferred. *Grandco,* 536 F.2d at 203; general conclusory statements will not be sufficient. *Id.* This evidence must demonstrate that the defendant exhibited bad faith for the purposes of "retaliating for or deterring" the exercise of constitutionally protected rights. *Wilson v. Thompson,* 593 F.2d 1375, 1383 (5th Cir. 1981).

The Plaintiffs allege three activities by state officials as the basis for its allegations of bad faith: multiple prosecutions, several of which have been dismissed or have resulted in acquittal, a number of searches of the bookstore and seizures of its property. and the filing of a civil nuisance suit. As has already been stated of the 34 state criminal prosecutions brought against Plaintiffs based on obscenity charges, three have led to acquittals, three have led to convictions, a number have been dismissd, and at last nine are pending. Additionally, the Denmark II has been searched, pursuant to valid warrants, five times during an 18 month period. Many items were seized during these searches and misdemeanor obscenity charges occasionally followed the searches. A civil nuisance suit has also been filed and is pending.

We note that multiple prosecutions, in themselves, are not sufficient to support an inference of bad faith. *Grandco,* 536 F.2d at 203. To meet the requirement of bad faith, the state officials must have filed criminal charges, without regard to their outcome, "as instrumentalities for the suppression" of a plaintiff's constitutional rights.

Wilson, 593 F.2d at 1383. The defendant's conduct must rise to the level of "official lawlesssness." *Grandco,* 536 F.2d at 204; *see Dombrowski,* 380 U.S. at 484-87. With respect to searches and seizures, only when the searches have occurred "repeatedly [and] without judicial authorization" will bad faith be made out. *Hicks v. Miranda,* 422 U.S. 333, 351 (1978).

Plaintiffs ask this Court to infer bad faith on the part of Defendants based on the filing of prosecutions by a prosecutor and searches of their bookstore by police acting pursuant to valid warrants. With one exception, the filing of a nuisance suit, there is no other evidence indicating any harassment or undue annoyance by the Defedants to support an inference of bad faith. The filing of a public nuisance suit will not raise what are lawful enforcement practices of a state obscenity law, which is not being challenged on constitutional grounds, to the level of a bad faith prosecution by state officials.

Moreover, the Defendants have successfully prosecuted the Plaintiffs on three obscenity charges. The number of violations the Defendants is charged with is far less than the number already found not to amount to a bad faith practice by state officials. *See Grandco,* 536 F.2d at 202 (100 prosecutions brought). All searches were done pursuant to valid warrants signed by a neutral and detached magistrate and based upon probable cause. *See Hicks v. Miranda,* 422 U.S. 332, 351 (1978) (searches issued upon probable cause cannot lead to conclusion of bad faith by police officers.) Indeed, the very search procedures used here have been upheld by the Seventh Circuit. *Sequoia Books, Inc. v. McDonald,* 725 F.2d 1091

(7th Cir. 1984), *cert. denied,* 105 S.Ct. 83 (1985). In short, it cannot be said that either the quality and quantity of prosecutions involved, or the conduct of the police in validly searching and seizing the Plaintiffs bookstore demonstrates the bad faith on the part of the Defendants required to satisfy the bad faith exception to the *Younger* abstention doctrine. Accordingly we must abstain and deny Plaintiffs' request for an injunction. Defendants' motion to dismiss is granted.

IT IS SO ORDERED.

ENTER:

/s/ CHARLES RONALD NORGLE, Judge
U.S. DISTRICT COURT

DATED: 5/28/85

No. 86-1417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHARON COLLINS, et al.,

Petitioners,

v.

THE COUNTY OF KENDALL, ILLINOIS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
ADDITIONAL STATEMENT OF THE CASE ..	1
ARGUMENT:	
I.	
PETITIONERS' COMPLAINT WAS PROPERLY DISMISSED PURSUANT TO FED.R.CIV.P. 12(b)(6)	2
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	PAGE
Cameron v. Johnson, 390 U.S. 611 (1968)	6
Collins v. County of Kendall, Ill., 807 F.2d 95 (7th Cir. 1986)	2, 4, 5, 6
Conley v. Gibson, 355 U.S. 41 (1957)	5
Dombrowski v. Pfister, 380 U.S. 479 (1965) ...	6
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) ..	6
Grandco Corp. v. Rochford, 536 F.2d 197 (7th Cir. 1976)	5, 6

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) ... 2

Krahm v. Graham, 461 F.2d 703 (9th Cir. 1972) . 3, 4

Kugler v. Helfant, 421 U.S. 117 (1975) 3

Perez v. Ledesma, 401 U.S. 82 (1971) 3

Sequoia Books, Inc. v. McDonald, 725 F.2d 1091 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 83 (1984) . 5

Sheridan v. Garrison, 415 F.2d 699 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970) 3, 4, 6

Younger v. Harris, 401 U.S. 37 (1971) .. 1, 2, 3, 4, 5, 6

CONSTITUTIONAL PROVISIONS AND STATUTES:

Fed.R.Civ.P. 12(b)(6) 2

TREATISES:

Cook & Sobieski, 2 *Civil Rights Actions*, ¶ 3.15, p. 3-152 (1986) 3

Wright & Miller, *Federal Practice and Procedure*, § 4255, p. 579 (1978) 3

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ADDITIONAL STATEMENT OF THE CASE

Petitioners contend that their complaint, which was grounded upon the bad faith exception of the *Younger* doctrine, was improperly dismissed by the district court and wrongfully affirmed by the Seventh Circuit Court of Appeals. Petitioners' complaint alleged bad faith by noting that Respondents instituted approximately thirty-four (34) criminal cases and one (1) civil nuisance case charging

Petitioners with obscenity violations. Although Petitioners state that three (3) cases resulted in not guilty verdicts, Respondents note that three (3) additional cases resulted in findings of guilty.

Both the district court and the Seventh Circuit Court of Appeals carefully reviewed Petitioners' complaint and found that it "failed to set forth facts supporting an inference of bad faith prosecution or harassment." *Collins v. County of Kendall, Ill.*, 807 F.2d 95, 99 (7th Cir. 1986). Both courts carefully considered Petitioners' allegations and viewed them consistent with the mandate of Fed.R. Civ.P. 12(b)(6). The lower courts properly concluded that Respondents' activity, instituting approximately thirty-four (34) criminal prosecutions, some of which have been successful, simply does not approach the threshold level necessary to invoke the bad faith exception of the *Younger* doctrine.

ARGUMENT

I.

PETITIONERS' COMPLAINT WAS PROPERLY DISMISSED PURSUANT TO FED.R.CIV.P. 12(b)(6).

The parties do not dispute the general rule that the federal courts may not enjoin pending state criminal prosecutions. *Younger v. Harris*, 401 U.S. 37 (1971). The rule, however, is not without exception. As Petitioners aptly note, bad faith or harassing prosecution is an exception to the *Younger* doctrine. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975). Petitioners contend that the Seventh Circuit erred in affirming the district court's deci-

sion granting the Respondents' motion to dismiss. Specifically, Petitioners argue that their complaint adequately stated a claim of bad faith and harassing prosecution sufficient to invoke an exception of the *Younger* doctrine. Additionally, Petitioners complain that Sharon Collins was improperly grouped with the other Plaintiffs, for *Younger* purposes. Respondents will address these arguments in *seriatim.*

Initially, Respondents note that although the bad faith exception of *Younger* is available, it is rare that an individual would satisfy the prerequisites for its invocation. One commentator suggests that there is "not a single case in which the Supreme Court has refused to apply *Younger* because of bad faith, harassment, or other extraordinary circumstances." Cook & Sobieski, 2 *Civil Rights Actions*, ¶ 3.15, p. 3-152 (1986). *See also* Wright & Miller, *Federal Practice and Procedure*, § 4255, p. 579 (1978). Because bad faith generally means the bringing of a prosecution "without hope of obtaining a valid conviction" (*Kugler v. Helfant*, 421 U.S. 117, 124 (1975), *quoting*, *Perez v. Ledesma*, 401 U.S. 82, 85 (1971)), the lower federal courts have applied the bad faith exception in only the most grievous of factual circumstances. *See e.g.*, *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972) (over 100 unsuccessful prosecutions combined with illegal searches and a concerted vindictive publicity campaign).

Petitioners rely principally upon *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969) and *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972) in support of their proposition that the bad faith exception of the *Younger* doctrine should be applied in this case. Respondents note, however, that the factual circumstances in *Sheridan* and *Krahm* are not sufficiently analogous so as to lend support to Petitioners' Writ.

Petitioners' reliance upon *Sheridan* and *Krahm* is misplaced. *Sheridan*, a pre-*Younger* decision, contained allegations of prosecutorial misconduct involving the intimidation of witnesses through legal process as well as threats of physicial violence, the wrongful suppression of evidence and other allegations of wrongful conduct, all involving "a 'marked inhibiting effect' on news coverage of the district attorney's investigation." *See Sheridan v. Garrison*, 415 F.2d 699, 702 (5th Cir. 1969). Even assuming that the holding of *Sheridan* is consistent with the principles later addressed by this Court in *Younger*, the allegations of bad faith found in *Sheridan* far exceeds the level of alleged misconduct made by Petitioners against Respondents. Furthermore, *Krahm*, as noted by the Seventh Circuit, involved an "extreme factual situation" not present in the matter before this Court. *Collins v. County of Kendall, Ill.*, 807 F.2d 95, 101 (7th Cir. 1986).[1] Neither *Sheridan* nor *Krahm*, due to their outrageous factual circumstances, lends credence to Petitioners' claim of bad faith under *Younger*.

In support of their argument that Respondents' motion to dismiss was improperly granted, Petitioners argue that Respondents' ultimate goal was to suppress first amendment activity and not to obtain an appropriate determination of the obscenity *vel non* of the materials seized by Respondents. Additionally, Petitioners contend that the

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[1] *Krahm* involved the following conduct: (1) over one hundred (100) unsuccessful prosecutions; (b) extensive press coverage of an anti-pornography campaign spearheaded by the mayor; (c) the utilization of petitions designed to influence the community so that jurors would more likely convict at trial; (d) threatening city magistrates with termination by the mayor and city council; (e) statements tying the plaintiffs with the mafia; and, (f) conducting approximately twelve (12) illegal searches and seizures.

"ultimate aim" of Respondents was the "forced permanent closure of the Denmark Bookstore and total suppression of dissemination of protected material . . ." (Petitioners' Brief, p. 14). Petitioners' argument, however, constitutes mere conjecture because their complaint is wholly insufficient in its attempt to invoke the bad faith exception of the *Younger* doctrine. The Seventh Circuit properly noted that the seizure of books and magazines from Petitioners' store was done pursuant to judicial warrants which were constitutional in all respects. *Collins v. County of Kendall, Ill.*, 807 F.2d 95, 101 (7th Cir. 1984), *citing Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 83 (1984). Furthermore, the Seventh Circuit cited three prosecutions which did result in guilty verdicts. *Collins v. County of Kendall, Ill.*, 807 F.2d at 100.[2]

Contrary to Petitioners' suggestions that their complaint adequately stated a claim, both the district court and the Seventh Circuit specifically noted that the complaint was wholly deficient in its allegations of bad faith or harassing prosecutions. Both Courts applied the appropriate presumptions and inferences owed Petitioners' complaint pursuant to *Conley v. Gibson*, 355 U.S. 41 (1957). The Seventh Circuit found that Petitioners' complaint did not allege that Respondents utilized or threatened to utilize prosecutions "regardless of their outcome" or with "no expectation of convictions, but only to discourage exercise of protected rights." *Collins v. County of Kendall, Ill.*, 807 F.2d

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[2] Even without consideration of the three guilty verdicts, instituting approximately 30 criminal prosecutions over a two year period, does not, in and of itself, constitute bad faith or harassment. *Collins v. County of Kendall, Ill.*, 807 F.2d 95, 99 (7th Cir. 1986), *citing Grandco Corp. v. Rochford*, 536 F.2d 197, 203 (7th Cir. 1976).

95 (7th Cir. 1986), *citing Sheridan v. Garrison*, 415 F.2d 699, 706 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970) and *Cameron v. Johnson*, 390 U.S. 611 (1968). Even applying the "official lawlessness" standard of *Dombrowski v. Pfister*, 380 U.S. 479 (1965), both the district court and the Seventh Circuit properly found that the allegations of Petitioners' complaint failed to meet the elevated standard necessary for the invocation of the bad faith exception. *See also Grandco Corp. v. Rochford*, 536 F.2d 197, 204 (7th Cir. 1976).

Petitioners also argue that even if injunctive relief was unobtainable under the bad faith exception, Sharon Collins should have been considered separate and distinct from the corporation for purposes of *Younger* principles. Petitioners rely solely on *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) in support of their proposition. In rejecting Petitioners' argument, the Seventh Circuit properly noted that *Doran* was not violated when Sharon Collins was grouped in the "same hopper" with the other Petitioners. *Collins v. Kendall County, Ill.*, 807 F.2d at 101-02. It is undisputed that Sharon Collins was an employee who worked for the Denmark Bookstore. She did not possess a separate and distinct business interest nor was she treated separately and distinctly with regard to the prosecutions. Because the interests of all Petitioners are identical in contesting the state litigation, *Doran* does not require that this Court ignore the close relationship among the parties. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975).[3]

[3] Although *Doran* refused to place three separate entities in the "same hopper," this Court also noted that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them . . ." *Doran*, 422 U.S. at 928.

CONCLUSION

By reason of the foregoing, this Honorable Court should deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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